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January 3, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 5, 2007

Case Number: TSO-0530

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual"), to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

The individual has been an employee of a Department of Energy (DOE) contractor (the DOE Contractor) since June 2004. On November 23, 2004, the individual signed a DOE Drug Certification and subsequently received a DOE access authorization. In March 2006, the DOE conducted a personnel security interview (the 2006 PSI) with the individual concerning information collected during his background investigation. As a result of information provided by the individual at the PSI, the DOE suspended his access authorization on October 17, 2006.

In July 2007, the Manager of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. The Notification Letter indicates a security concern under Section 710.8(1) (Criterion I). Specifically, the Notification Letter finds that during the individual's 2006 PSI, the individual discussed his past marijuana use, and his presence where marijuana use was occurring. The Notification Letter finds that, at this PSI, the individual made the following statements that raise a security concern:

1. He stated that he has smoked marijuana on two occasions, in the spring of 1999 and in the summer of 2001. 2006 PSI at 5-6;

2. He acknowledged that, since 2001, he has been in settings where marijuana use has occurred.

a. He indicated that, approximately two months before the PSI, he was present when approximately ten persons, who he described as "a bunch of friends together", used marijuana "in a social capacity." 2006 PSI at 5.

b. Asked how often he has "been around" marijuana during the last year, he replied, "Maybe five times." 2006 PSI at 9.

3. The individual estimated that 5 or 10% of his current associates use marijuana. 2006 PSI at 8.

4. The individual acknowledged "knowingly being in the presence of others who are in possession of these illegal drugs." 2006 PSI at 10-11.

In addition to the general requirement that the individual not be involved with illegal drugs, the Notification Letter finds that the individual, in signing his November 2004 DOE Drug Certification, agreed to the following restrictions with respect to marijuana and other illegal drugs:

I agree that I will not buy, sell, accept as a gift, experiment with, traffic in, use, possess, or be involved with the illegal drugs cited above at any time, in any country, in any job in which I have been given a DOE access authorization. Involvement includes knowingly being in the presence of others who are in possession of these illegal drugs.

July 2007 Notification Letter, Enclosure 1. Therefore, in addition to the general security concern, the Notification Letter finds that the individual violated his drug certification commitment.

The individual requested a hearing to respond to the security concerns raised in the notification letter. In a written response to the notification letter, the individual's counsel indicated that between the time the individual signed his DOE drug certification in November 2004 and the March 2006 PSI, the individual was involved in five incidents of contact with marijuana. The

descriptions of these incidents provided in the response are summarized below. With the exception of the 2006 Super Bowl party, the specific dates of the incidents were not described.

(1) A graduate student party: the individual attended a small gathering at the house of a fellow student to celebrate the last day of classes. He believes that a few people there may have used marijuana, but does not recall seeing them smoke it or possess it.

(2) The February 2006 Super Bowl party: the individual returned to his home after watching the Super Bowl and saw that a neighbor in his town house complex was having a party. He stopped to say hello to the neighbor outside the house but did not enter the house. He thought he smelled marijuana smoke coming from the house, but he did not actually see anyone using it.

(3) The cousin's marijuana: the cousin of the individual's wife visited them for lunch and pulled out a bag of what appeared to be marijuana. The individual asked him to put it away and not to bring it to his home again.

(4) and (5) Smoke in the neighbors' house: On two occasions, the individual briefly visited his neighbors to invite them to dinner. The neighbors had been upstairs when he arrived, and the individual smelled smoke that he did not believe was cigarette smoke.

Individual's response at 6-7. The individual's counsel further asserted that testimony at the hearing would show that the individual's involvement in each of these incidents was unknowing and that the individual acted appropriately to remove himself from the presence of marijuana. Individual's response at 8. The individual's counsel also believed that the testimony would show that the individual will avoid contact with marijuana in the future and that the security concern has been mitigated. *Id.* at 9.

The hearing was convened on November 8, 2007 (hereinafter the "Hearing"), and the testimony focused on the individual's efforts to establish the circumstances of his recent contacts with marijuana and to demonstrate that he will not use or be involved with marijuana or other illegal drugs in the future.

II. REGULATORY STANDARD

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *Personnel Security Review (Case No. VSA-0087)*, 26 DOE ¶ 83,001 (1996); *Personnel Security Hearing (Case No. VSO-0061)*, 25 DOE ¶ 82,791 (1996), *aff'd*, *Personnel Security Review (VSA-0061)*, 25 DOE ¶ 83,015 (1996). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence which could mitigate security concerns.

Nevertheless, the evidentiary burden for the individual is not an easy one to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues.

B. Basis for the Hearing Officer's Decision

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. HEARING TESTIMONY

At the Hearing, testimony was received from six persons. The DOE counsel presented the testimony of the DOE security specialist who interviewed the individual at his 2006 PSI. The individual testified and presented the testimony of his wife, a friend/neighbor, a friend/co-worker, a friend/former co-worker, and his supervisor.

A. The DOE Security Specialist

The DOE security specialist testified that he has worked for the DOE as a specialist investigating security clearance eligibility issues for fifteen years. TR at 16-17. The security specialist stated that the individual had a government security clearance with another agency beginning in 2003 and is familiar with national security matters. TR at 29.

The security specialist testified that at the 2006 PSI, the individual stated that he last smoked marijuana in the summer of 2001. However, the individual reported that on five separate occasions in the year preceding the 2006 PSI, he had social contact with persons who he believed to be using or possessing marijuana. TR at 19-21. The security specialist stated that when the individual reported these contacts during the 2006 PSI, the security specialist reminded him that he had signed a DOE Drug Certification in November 2004 that prohibited such contacts. He explained:

We look at that form as, in essence, a written contract between the individual and the Department of Energy that they will not have any involvement/contact with drugs or people who are using or possessing drugs.

TR at 21-22. He also stated that the individual reported that the most recent contact involving marijuana occurred about two months prior to the March 2006 PSI. TR at 24. According to the security specialist, the violation of a drug certification is more difficult to mitigate than past drug use because it requires a showing of rehabilitation or reformation from a breach of trust. TR at 25.

The security specialist stated that at the 2006 PSI, he did not ask the individual about the specific circumstances of the five incidents of contact with marijuana that the individual reported. TR at 30. He also stated that he did not ask the individual if he knew in advance that he would be bringing himself into contact with marijuana, or if he left the situation once he discovered the presence of marijuana. TR at 31. He stated that at the 2006 PSI, the individual's responses tended to indicate that his reported contact with marijuana "was in a fairly casual, possibly fleeting way." TR at 32. The security specialist testified that he should have followed up with questions to ascertain whether or not the individual's reported contacts with marijuana were intentional and prolonged contacts. TR at 32.

In hindsight, I do wish I had nailed him down to when he became aware of this activity - exactly what was the time frame between your becoming aware of that and what did you do after that.

TR at 15-16.

After hearing the testimony of the individual and the other witnesses, the DOE security specialist still expressed concerns that the individual's behavior may have violated his drug certification, even though the security specialist acknowledged that he should have elected more information during the 2006 PSI about the individual's contacts with marijuana users. TR at 130-131.

B. The Individual

The individual testified that shortly after being hired by a DOE contractor in June, 2004, he completed forms for a DOE security clearance. As a result of reporting past marijuana use, he

completed a DOE Drug Certification in the Fall of 2004, and received a DOE clearance in January, 2005. TR at 96-98. He now is applying for a higher level clearance. TR at 98-100.

The individual testified about his marijuana use. He stated that he used marijuana on two occasions, in the spring of 1999 and the summer of 2001, when he was attending college. TR at 101. The individual testified that he told the security specialist at the 2006 PSI that he had contact with marijuana on five occasions in the period following the signing of his DOE Drug Certification. TR at 103. The individual stated that at the 2006 PSI, he told the security specialist that he had violated his drug certification. He testified that he believes that he took appropriate action in each instance to remove himself from situations when he realized that marijuana might be present. TR at 104. With regard to the 2006 Super Bowl party incident, he stated that he was about to enter his neighbor's house when he smelled marijuana coming from the open garage. At that point, he and his wife politely told their neighbor that they had to leave. TR at 105.

He stated that his behavior at the graduate student party also was appropriate. He stated that after a couple of hours, some of the students started talking about wanting to use marijuana. He testified that "as soon as I found out about it, I left." He stated that he did not actually see anyone possessing or using marijuana at this party. TR at 107.

The individual testified that on two occasions, he smelled an unfamiliar type of smoke when he stopped by a neighbor's house to invite him to dinner. He stated that he never saw this neighbor use or possess marijuana. However, the individual stated that when his neighbor later admitted to him that he had been using marijuana, the individual realized that he must have smelled marijuana smoke on those two occasions. TR at 108. Under questioning from the DOE counsel, the individual insisted that he did not recognize the smell of marijuana on those two occasions, that it was a faint anomalous-smelling smoke that did not smell like cigarette smoke. TR at 123-125. He testified that he does not believe that his present friendship with this neighbor violates his DOE drug certification because the neighbor has made a commitment not to use illegal drugs. TR at 109.

The individual testified that his behavior with regard to his wife's cousin also was appropriate. He stated that he and the cousin had been shopping for a gift for the individual's wife. When they returned to the individual's house

he asked if he could take care of something. I didn't know what he was referring to, but I said, yes. He took out a bag of what appeared to be marijuana. I was really angry at that time and asked him to leave, and to not bring that back into my house.

TR at 110. The individual stated that his wife's cousin previously had stayed as a guest in his home, and had given him no reason to suspect that he possessed or used marijuana or other drugs. TR at 111.

The individual stated that he remained committed to continuing to uphold the commitments in his DOE drug certification.

I don't have any intention of ever using drugs. I don't intend on being around people who are using drugs, or being close with drug users.

TR at 113.

With regard to the individual's statement at the 2006 PSI estimated that five to ten percent of the people he associates with are marijuana users, the individual testified that none of his close associates are marijuana users, and that he gave the answer of five to ten percent based on the total group of the people he encounters in his life.

It was the people I stayed in contact with in college, either e-mail or over the phone, or people that I would be around at the bus stop, or maybe somebody we sat next to at a hockey game. It was everyone that I came in contact with, and 5 to 10 percent seemed like the appropriate answer.

TR at 111.

C. The Individual's Wife

The individual's wife testified that she is a school teacher, and that she met the individual in January 2002 when they took a class together in college. She stated that she has no experience with illegal drugs.

I have not used them myself, I haven't seen them being used. I have no experience.

TR at 42. She stated that she and the individual have lived together since late 2002. TR at 39, 47. She testified that the individual is trustworthy. TR at 47. She stated that she and the individual know each other's friends very well, and that two to three times a week they have dinner with friends. TR at 48. She stated that none of their friends or neighbors have brought drugs or drug paraphernalia into their home. TR at 41. She stated that the individual told her about the incident when her cousin produced a bag of marijuana in their home and told her that "my cousin left pretty soon after the incident." TR at 41.

She stated that she has never seen the individual smoke marijuana. TR at 48-49. She said that the only instance when she and the individual were in an environment where marijuana was being used was at a neighbor's home after the 2005 or 2006 Super Bowl. TR at 43-44. She testified that the neighbor had invited them to come in and attend a party that he was hosting. They initially agreed, but then the individual told her "we need to go immediately." TR at 44. She stated

[the individual] told me that he had seen something that seemed suspicious going on. He thought there may have been drug use in the house and that neither of us wanted to be around that, so we got ourselves out of the situation.

TR at 44. She testified that she and the individual have not invited that neighbor into their home. TR at 45.

The individual's wife stated that the individual told her that he had smoked marijuana and that this use "happened before we met when he was in college." TR at 49.

D. The Individual's Friend/Neighbor

The individual's friend/neighbor testified that he lives next-door to the individual and his wife, that he has known the individual for at least three years, and that he considers him a close friend.

TR at 71. He stated that he used to see the individual two or three times a week, but he is now in school so he sees the individual less often. TR at 71. The friend/neighbor stated that he has never seen the individual use marijuana or be present in an environment where marijuana was being used. TR at 75-76. The friend/neighbor stated that he has used marijuana in his own home, and that he regularly burns incense in his home. TR at 71-72.

The friend/neighbor testified that, to his knowledge, he was never been around the individual when he was using or had recently used marijuana. He stated he avoided the individual and other people when he was using marijuana by staying in his house and not answering the door or telephone. TR at 73-74. He stated that he could remember no time when the he was actively using marijuana and the individual came into his house to ask him to dinner. TR at 74.

The friend/neighbor stated that he last smoked marijuana at the end of 2005 or in early 2006. He stated that he stopped after he was arrested for Driving Under the Influence and the traffic court ordered him to submit to random drug testing and to attend alcohol safety classes. TR at 72, 74-75.

The friend/neighbor testified that while he was using marijuana, he does not believe he discussed his use with the individual, because "it was known . . . that it wasn't something that he would approve of or condone." TR at 75. He stated that after his DUI, he discussed his marijuana and alcohol use with the individual, who helped him make changes in his life.

[the individual] was actually very supportive of me, getting over such things and giving me a positive place to go to without having negative influences around me.

TR at 72. The individual's friend/neighbor stated that he has committed himself not to use illegal drugs in the future. TR at 78.

E. The Individual's Friend/Co-worker

The individual's friend/co-worker testified that he has been a co-worker of the individual since the individual came to work for the DOE contractor in June 2004. TR at 80. He also was a neighbor of the individual for fourteen months. He described the individual as a good friend who he socializes with on a daily basis. He stated that when he was a neighbor of the individual, he would have dinner with the individual, his wife and their friends on average about twice a week. He stated that he never observed any drug use, drug paraphernalia, or discussion of drugs at any of these social gatherings. TR at 81. He testified that he has never seen the individual use drugs or be around other people who were using drugs. TR at 82-83.

The individual's friend/co-worker stated that he was somewhat familiar with the individual's marijuana history because he worked

as a security specialist in the individual's office, had reviewed the PSI transcript, and knew that the individual had signed a DOE drug certification. TR at 83-84. He stated that other than the individual's reported uses of marijuana in college, he has no other knowledge that the individual has used marijuana. TR at 83-84.

F. The Individual's Friend/Former Co-Worker

The individual's friend/former co-worker testified that he is a retired military officer and that he and the individual were co-workers at the individual's former employer beginning in 2003. TR at 87-88. The former co-worker stated that he currently works for a Federal security agency and holds a security clearance. TR at 89. He testified that he socializes with the individual two or three times a month at the individual's home, considers him a very close friend, and attended his wedding. TR at 89, 91. He stated that

[the individual] demonstrates a level of maturity way beyond his years, impeccable integrity.

TR at 89. He testified that he has never seen the individual, his wife, or the individual's friends and neighbors use or be involved with illegal drugs. TR at 90, 91.

G. The Individual's Supervisor

The individual's supervisor testified that he has known the individual for a little over three years, and that they work extremely well together. TR at 51. He stated that both he and the individual have been promoted as a result of projects that they worked on together. TR at 51-52. He testified that he has socialized with the individual and the individual's friends and neighbors at least a dozen times. TR at 53. He stated that he has never seen any indication of drug use by the individual or anyone else at these gatherings. TR at 53-54. He stated that the individual meets his high standard for a friend.

I think my high bar for friends is probably built out of my initial professional career in the military. Served in some small, very specialized units that put a premium on friendship, put a premium on things like loyalty and integrity, commitment to the mission, and [the individual] embodies all of those things.

TR at 54. The individual's supervisor stated that in the context of discussions with the individual about his clearance process, he learned that the individual had experimented with marijuana twice when he was in college. TR at 55. He testified that the individual is an exceptionally effective employee who takes responsibility for problems that arise on a project and works to fix them quickly. TR at 58.

The individual's supervisor stated that the individual told him that he reported at his 2006 PSI that he had been in the presence of marijuana five times in the year following the signing of his DOE drug certification. TR at 59. He stated that the individual told him about the limited nature of these exposures to marijuana. TR at 60. The supervisor stated that in light of the individual's explanations of the limited nature of his exposures to marijuana use, the supervisor continues to have the highest regard for him. TR at 61.

I thought to myself that in all of the projects that [the individual] and I have worked on, in all the encounters, that there wasn't a single time that [the individual] had given me a reason to doubt his word. There wasn't a white lie, there wasn't a shaded truth in our professional or personal interactions, so there was no reason for me to doubt anything that he had said.

TR at 62. The supervisor testified that he has held a security clearance for five years, and that he understands that the DOE has strict, sometimes dynamic, rules and regulations governing security matters. TR at 64. He stated that he has absolutely no reservations about being a character witness for the individual. TR at 68.

IV. ANALYSIS

The DOE's Notification Letter indicates that at his 2006 PSI, the individual provided answers concerning his contact with marijuana and marijuana users that appeared to indicate involvement with marijuana in violation of his 2004 DOE Drug Certification. The association with drug users and the violation of his commitment to the DOE raise a Criterion L security concern.

The individual believes that he has mitigated these concerns. With respect to the five recent contacts with marijuana that he reported at the 2006 PSI, he contends that the testimony and evidence in this proceeding have demonstrated that he did not knowingly place

himself in a situation where marijuana was present and that he behaved appropriately to remove himself from those situations. For the reasons stated below, I conclude that the individual's arguments and supporting evidence mitigate the Criterion L concerns identified in the Notification Letter.

The testimonial evidence in this case supports the individual's assertions that he has not been knowingly involved with marijuana or marijuana users since he last used marijuana in the summer of 2001. Specifically, the individual's wife testified that she and the individual left a neighbor's 2006 Super Bowl gathering immediately after the individual sensed that drug use might be taking place, and that they have not had subsequent social contacts with this neighbor. She testified that the individual told her that he confronted her cousin when the cousin displayed a bag of marijuana at their home, and that the cousin left their home soon after this confrontation. The individual's neighbor testified that he used marijuana secretly in his home prior to February 2006 and that he also burned incense, so that the individual might well have smelled an anomalous smokey odor on two occasions when he stopped by the individual's house to invite him to dinner. The neighbor also confirmed that he kept his marijuana use secret from the individual and his other neighbors, and only told the individual about his past marijuana use following a DUI conviction that convinced him to stop using marijuana.

The individual offered no corroborative testimony concerning his unexpected and brief contact with marijuana use at a graduate student gathering, but I note that all of the individual's past use of marijuana as well as his reports of subsequent contacts with marijuana or marijuana use are self-reported. This makes me more inclined to accept the individual's statements about the limited nature of these contacts.

The individual's general testimony concerning his very limited contact with marijuana is supported by the testimony of his wife and his other witnesses, who testified that the frequent social gatherings at his home involve no use or contact with marijuana. I am particularly impressed by the fact that two friend/co-workers and the individual's supervisor all testified that they have socialized on a frequent basis with the individual and his neighbors (including the neighbor who admits to having secretly used marijuana) at the individual's home, and that there were no indications of marijuana use by anyone at these gatherings. I do not believe that the individual would invite his co-workers and his supervisor to his home on a regular basis to socialize with his

friends if he thought that these friends were currently using marijuana.

The DOE security specialist testified that he regrets that the individual did not provide mitigating information at his 2006 PSI about his contacts with marijuana users and that he did not ask for more information concerning the individual reported five contacts with marijuana users subsequent to the signing of his DOE drug certification. Without any further explanation, the individual's responses to the PSI questions about contacts with marijuana use clearly indicate a security concern and a violation of his drug certification commitment. However, I accept the individual's explanation that at his 2006 PSI, he was attempting to be scrupulous in responding to the security specialist's questions by reporting any degree of contact with marijuana users, and the individual did not realize that he should have provided mitigating information. I also agree with the statement of the DOE Counsel that she made at the close of the Hearing after consulting with the security specialist. She indicated that the individual

has taken significant steps to mitigate his circumstances since this process has begun, and he surrounds himself presently with positive people who think very highly of him.

TR at 141.

It is clear to me from the individual's testimony and from the testimony of his witnesses at the Hearing that the individual has not attempted to minimize or otherwise misrepresent his recent contacts with marijuana. At the Hearing, the individual impressed me as a very straightforward, credible, honest person. This view is strongly supported by the testimony of his co-worker friends and by his supervisor. These witnesses stated that the individual possesses exceptional maturity and personal integrity. In particular, his supervisor's description of how the individual conducts himself in the workplace indicates that the individual is scrupulously honest and willing to accept responsibility for any problems that occur on his projects. In addition, the supervisor's testimony concerning his discussion with the individual about the individual's 2006 PSI responses reveals how the individual's exceptional honesty may have led to his making responses at the PSI that failed to provide mitigating information and therefore exaggerated his contact with marijuana.

Accordingly, I find that the individual has mitigated the concerns that he violated the terms of his 2004 DOE Drug Certification. I find that with respect to each of the five reported contacts with marijuana subsequent to executing his certification, the individual has shown that the contact was at the outset unknowing, and that the individual acted appropriately to remove himself from the situation once he became aware of it. The fact that he self-reported even these brief, minimal contacts is a sign that the individual is scrupulously honest about these matters. Further, the individual has demonstrated that he has been sensitized to avoid any further contacts. Based on all the foregoing, I find that the individual presented convincing, probative evidence that he will continue to uphold his Drug Certification commitment by avoiding all future contact with illegal drugs or individuals using illegal drugs. It therefore is my opinion that the individual has mitigated the DOE's Criterion L concerns. See *Personnel Security Hearing (Case No. TSO-0324)*, 29 DOE ¶ 83,038 (2007) (self-reported violations of a DOE Drug Certification mitigated by findings that the individual is honest and reliable, and highly unlikely to commit future violations).

V. CONCLUSION

For the reasons set forth above, I find that the DOE properly invoked Criterion L concerns regarding the individual's application for an access authorization. After considering all the relevant information, favorable and unfavorable, in a comprehensive and common-sense manner, I find that the evidence and arguments advanced by the individual convince me that he has mitigated these security concerns. Accordingly, I find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest.

It therefore is my conclusion that the individual's access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: January 3, 2008